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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHELE JEAN HENRY, Defendant and Appellant.	A140601 (Solano County Super. Ct. No. FCR294318)

INTRODUCTION

Driving 107 miles per hour on Highway 80, defendant struck an SUV. Two of the people in the SUV managed to get out and were trying to extricate the third person from the back seat when another car collided with the disabled SUV and struck one of the two people on the highway. Two people were killed. Defendant admitted smoking marijuana and taking prescription drugs—hydrocodone, sertraline, and lorazepam—in their prescribed dosages the day and evening before the accident. Blood tests confirmed she had marijuana and therapeutic levels of her prescriptions drugs in her system at the time of the accident. She also had a gun in her purse.

A jury convicted defendant of two counts of gross vehicular manslaughter while intoxicated and one count of carrying a loaded firearm in a public place. (Pen. Code, §§ 191.5, subd. (a); 25850, subd. (a).) She was sentenced to state prison for six years.

On appeal, defendant argues the prosecutor committed gross misconduct by intimidating the driver of the second car into asserting his Fifth Amendment privilege

against self-incrimination, and failing to disclose before trial that his expert would opine defendant was driving under the influence. She also argues the trial court committed error by sustaining the driver's assertion of the privilege; declining to grant the driver immunity to testify; and denying her motion for a new trial. We find no prosecutorial misconduct or trial error and affirm.

STATEMENT OF FACTS

On January 29, 2012, at around 5:00 a.m., Floyd Williams was sitting in the front passenger's seat of Anthony Andrade's Explorer SUV. Vincente Santos was in the rear seat. The three were travelling from Sacramento to San Francisco. Andrade was going 68 miles per hour. He had changed lanes two to three minutes before the collision. Andrade's SUV was hit from behind. The SUV hit the cement barrier on the freeway and rolled over. As a result of impact, Williams momentarily lost consciousness. When he came to, he was upside down and the SUV was skidding on its top. He lost consciousness again, and Andrade, who was already out of the car, woke him up. Andrade wanted Williams to exit the car to help remove Santos from the rear. Williams eventually exited through a window. Both men tried to remove Santos, who was still breathing, but they were unsuccessful in freeing him from his seat belt, from which he was hanging upside down. Andrade pushed Williams to the median on the highway as a car approached, hitting Andrade. Mr. Andrade and Mr. Santos both died of multiple injuries.

Before the accident, Alan Silva was driving a semitrailer truck on Interstate 80 near Fairfield. A dark sedan raced past Silva moving at a fast speed. Silva looked in his mirrors for a highway patrol car, and when he returned his attention frontward he saw a cloud of smoke and dust on the road ahead from a collision between a white car and the dark sedan. He called 911.

At this time, San Francisco Sheriff's Deputy Scott Scoville was also driving westbound on Highway 80 in the fast lane. A dark sedan passed him at a high rate of

speed. Scoville estimated the car was travelling between 90 and 100 miles per hour. Scoville eventually came upon two cars that had apparently collided. The first car he saw, a white SUV, was turned over. The other car, a white sedan, was upright, further down the road. A body was located on the roadway, about 50 yards down the highway from the second car. Scoville pulled over next to the body, near a big rig. The person in the roadway had suffered severe trauma to the head and body and was not breathing.

California Highway Patrol (CHP) officer Vincent Heitman was dispatched to the collision site. He arrived and saw an SUV upside down on its roof in the roadway blocking the number one and two lanes (the fast lane and the HOV lane). A white sedan with significant damage was stopped in the third or fourth lane, 20 to 50 feet away from the overturned SUV. A man was lying on the roadway near the white sedan, not moving. Inside the SUV, Officer Heitman found another man who was not responsive. The two men were pronounced dead at the scene.

CHP officer William Wesselman also arrived at the scene around 5:30 a.m. He saw a big rig parked in the slow lane, a Ford Explorer overturned in one of the other lanes, and another vehicle stopped further ahead on the highway. A few minutes later, he located a maroon Buick overturned on the right side of the highway in some bushes. The roof of the Buick was caved in and defendant was sitting in the driver's seat. From the significant amount of body damage to the car, it appeared the Buick had rolled over. Defendant was removed by the fire department and paramedics and put in an ambulance. Wesselman found defendant's purse inside the car.

CHP officer Vanessa Juarez was the head investigating officer at the scene. When she arrived, a white SUV and another car were stationary on Interstate 80. She determined that just prior to the first collision, the SUV was in the number four lane, next to the slow lane, approaching the Waterman Boulevard exit on westbound Interstate 80. After the SUV made contact with defendant's car, it slid several lanes, rolled, bounced

off the median and came to rest on its roof. Then there was another collision between the SUV and a Toyota Corolla driven by a Mr. Soto.

Officer Juarez later spoke with defendant at the hospital. Defendant's speech was slow and thick, which is a sign of impairment. Her eyes were red and watery and she was very fidgety. She could not focus. Inability to focus is a symptom of being under the influence. Juarez gave defendant a horizontal gaze nystagmus (HGN) field sobriety test. Defendant did not have the lack of smooth pursuit and angle of onset associated with alcohol intoxication. However, Juarez did observe in defendant "distinct nystagmus [involuntary jerking of the eye] at extremes." This is a sign of impairment. People with head injuries may also show gaze nystagmus.

Juarez asserted defendant did not have a head injury. She did not complain of head pain, nor was she wearing bandages on her head. She was not upset, crying, distraught or acting as if she were in pain. She giggled when Juarez's partner searched her purse. Juarez believed defendant appeared impaired.

Defendant told Juarez she had gotten up too late to get to work on time and she was traveling at a speed of 80 miles per hour, 10 miles over the speed limit. She had to reach work by 5:00 a.m. and she left her house in Sacramento at 4:50 a.m. She said she saw the white SUV, and the next thing she knew, she lost control of her car, it overturned, and came to rest upside down. She did not mention that the SUV changed lanes.

Defendant also told Juarez she had smoked a bowl of marijuana a day or two previously. She had a medical marijuana card, but it had expired. She also took the prescription medications lorazepam and sertraline. She took one tablet of each drug the previous day in the prescribed dosage. She indicated the medications had no effect on her, but she was aware of the side effects listed on the pill bottle and was also advised of them by the pharmacist and her doctor.

CHP officer Kerrie Alleman went to the hospital to assist Officer Juarez with the investigation. Alleman observed phlebotomist Trisha Vaughn draw defendant's blood. Alleman handed the draw to Officer Juarez. Alleman searched defendant's purse and found a loaded Beretta handgun.

CHP officer John Blencowe handles accident investigations and reconstructions. He determined, based on a data download from defendant's Buick, that she was travelling before impact at a speed of 107 to 108 miles per hour. The car's brakes were not applied in the two and one-half seconds before impact. The posted speed limit on this part of Highway 80 is 65 miles per hour.

The Toyota Corolla involved in this incident did not have speed data. From the distance it traveled post-impact, Blencowe was able to determine the Toyota was traveling at a speed close to the posted speed limit of 65 miles per hour. However, he could not say if that was 50 or 70 miles per hour.

Criminalist Denise Lyons testified as an expert on the effects of drugs on the human body. Marijuana can impair one's ability to drive safely. Marijuana can impair motor control and alter perceptions of time and space, thereby affecting a person's perceptions of depth, speed, and distance while driving. It can also affect risk-taking behavior and the ability to perform divided attention tasks, such as simultaneously maintaining lane position and speed and checking the rearview mirror. Marijuana can stay in the system at detectable levels for approximately four to six hours.

Sertraline is an antidepressant. It does not act directly on the central nervous system and therefore "typically, on its own, it doesn't have an effect on driving, if taken as per the doctor's prescription."

Hydrocodone is an opiate which slows down or depresses the central nervous system. It can affect judgment and motor control, making it difficult to maintain lane position. One should not drive when using hydrocodone.

Lorazepam is in a class of drugs known as benzodiazepines. It is a central nervous system depressant and a sedative. It can affect one's ability to drive safely because it may cause inability to concentrate and inability to stay awake. It can affect motor control, causing a driver to have a difficult time maintaining lane position. The amount of time sertraline, hydrocodone, and lorazepam stay in the system is variable.

Lyons opined that the person in the following hypothetical was impaired for the purposes of driving: While driving 108 miles per hour, the person rear-ends another car on the freeway; after the accident the person's eyes are red and watery, there is distinct nystagmus at the extremes, speech is slow and thick; she is fidgety, her legs are constantly moving from side to side or bending toward her chest; she is sleepy and confused about how the collision occurred; and her blood tested .04 milligrams per liter for hydrocodone, .04 milligrams per liter for lorazepam, .16 milligrams per liter for sertraline, 2.0 nanograms per milliliter for Delta-9-THC, and 51.1 nanograms per milliliter for Delta-9-THC COOH.

Studies show that individuals who are using benzodiazepines (such as lorazepam) typically have approximately double the crash risk of persons who are not using the drug, and the effect of lorazepam and hydrocodone together is synergistic. All of the drugs were in therapeutic range, meaning they would have the desired effect, one of which is sedation. This effect would be enhanced because of the synergism between the drugs. She also opined the marijuana level was consistent with use in the last four to six hours. The thick speech, confusion, and sleepiness are all consistent with a central nervous system depressant. The marijuana may have contributed to the speeding at 108 miles per hour and rear-ending another car insofar as marijuana can influence the person's perception of how fast she is going and how much distance there is between her and the car in front of her.

Bill Posey, a forensic toxicologist, is the director of Central Valley Toxicology. He analyzed the sample of defendant's blood. He confirmed the blood tests showed

defendant had marijuana, hydrocodone, lorazepam and sertraline in her blood in the concentrations presented to Ms. Lyons in the hypothetical.

Defense Case

CHP officer William Gerstmar created a diagram of the accident. He opined that after colliding with the Buick, the Ford swerved out of control and overturned, hitting the concrete median. The Buick also swerved out of control, flipping several times. The Ford had a second collision with a Toyota.

Officer Juarez spoke with the driver of the Toyota, Michael Soto, at the scene while he was in an ambulance. He identified himself as a BART police officer. He said he was driving 75 miles per hour and swerved to avoid a vehicle stopped on the road, and that was when he saw the person in the roadway at the same time he was applying his brakes. He was unable to avoid hitting the person and his vehicle collided with both the person in the roadway and the vehicle that was blocking the road. He was asked if he was using a cell phone, either handheld or hands-free, and he advised Juarez he was not on a cell phone.

Later, Officer Juarez recontacted Mr. Soto by phone. Mr. Soto reiterated he was not on his cell phone. Juarez asked Mr. Soto if he was distracted by anything, such as reaching for something or changing the channel on the radio station. He advised Juarez, "No, I was looking straight ahead. I was doing nothing. I was driving in light traffic, and it came right up on me just like that."

Defendant testified on her own behalf. In January 2012 she lived in Sacramento with her husband and twin daughters and worked at a CVS pharmacy in Pleasant Hill. Because she had been late to work on Christmas morning, her boss had cut her hours for several weeks, and she was afraid she would lose her job altogether if she were late again. Her boss had scheduled her to work two back-to-back 8-hour shifts on January 29 and 30. She packed an overnight bag with her clothes and medications because she intended to spend the night with family near her job. On the day of the accident she was supposed to

start work at 5:00 a.m., but she overslept and did not wake up until 4:45 a.m. She was driving very fast to Pleasant Hill.

She took her prescription medicines the day before—hydrocodone, lorazepam and sertraline. She also took the hydrocodone in the prescribed amount on the morning of the accident. She smoked marijuana, for which she had a prescription that had recently lapsed, around 5:00 p.m. the night before the accident for a migraine headache. She did not believe the medications impaired her in any way.

She believed the accident happened because a car on her left changed lanes in front of her and she lacked sufficient time to avoid hitting it. Her car then went out of control and rolled. She thought she was going to die. She went in an ambulance to the hospital, where they took tests. At the hospital, she was still scared and upset. When the police officers came to speak with her, she had her eyes closed because when she opened them she kept seeing the car accident. She tried her best to answer the officers' questions. She was cited and released to her family. The next day, she was feeling faint, her head still hurt, her vision was blurry, and she still had pain in her neck and back, so she went to Kaiser. The blurred vision and headache lasted for several days.

After she ran out of gas on Christmas Day on her way to work, she had to wait an hour and a half in an industrial area for Triple A, and she was very scared. She started carrying a gun in her purse to and from work for protection. She knew she was not supposed to have such a weapon.

Rebuttal

Officer Juarez questioned defendant at the scene of the accident. Defendant said she was not injured and did not bump her head at the time of the collision. Defendant said she made a lane change and was one car length behind the other car when she lost control of her vehicle. She could not remember the actual impact, only her vehicle spinning. She did not tell Juarez the car in front of her had changed lanes. She also told Juarez the fastest she was traveling that day was 80 miles per hour.

DISCUSSION

Four of defendant's contentions concern her conviction in count two for the death of Mr. Andrade, who was hit by Mr. Soto's Toyota as he stood in the roadway, attempting to extricate Mr. Santos from the backseat of the overturned SUV. Defendant contends count two must be reversed because: (1) the prosecutor committed misconduct by threatening and intimidating a defense witness into invoking his Fifth Amendment privilege against self-incrimination; (2) the trial court's refusal to grant the witness immunity from prosecution was constitutional error; (3) the trial court should not have sustained the witness's assertion of his Fifth Amendment privilege not to testify; and (4) the trial court should have granted defendant's new trial motion on the ground the prosecutor committed misconduct by making sure the witness was unwilling to testify. Inasmuch as defendant's new trial claim merely incorporates her intimidation claim without other argument, we will treat it as subsumed under the intimidation claim.

Background.

All of these claims stem from Mr. Williams's trial testimony that he did not recall the color of the car that hit Mr. Andrade, but he did remember the person inside the car was looking at a white telephone prior to the impact. Outside the presence of the jury, the prosecutor informed the court neither he nor anyone else in his office had previously heard Mr. Williams's claim about seeing Mr. Soto looking at his cell phone. He said he thought they were going to need counsel for Mr. Soto before he testified because he could potentially incriminate himself. The court responded, "[Y]ou can certainly notify your witness of that." The prosecutor then informed the court he had made a strategic decision not to call Mr. Soto as a witness. However, he was "just . . . letting the court know" if Mr. Soto did testify as a witness, they would need to have counsel available to him. The court expressed surprise that no one in the district attorney's office had interviewed Mr. Williams prior to trial, but told the prosecutor "you can employ whatever strategy you wish."

Defense counsel said he planned to call Mr. Soto as a witness. The court told defense counsel to alert Mr. Soto "what the District Attorney has indicated, and he may want to contact BART police." Defense counsel responded he had no way of contacting the witness. At that point, the prosecutor stated: "I will contact Mr. Soto and let him know that he should have counsel here." The court clarified it was not ordering Mr. Soto to bring counsel: "Whatever the two of you advise him is up to you, but I'm not ordering him to do anything at this point. That's not appropriate." Defense counsel asked that, if possible, Mr. Soto be advised of his right to counsel in court and on the record prior to the day he was scheduled to testify "because what I'm concerned about is potentially orchestrating unavailability."

The next day, the court asked the prosecutor to explain his theory of Mr. Soto's liability, since it appeared Mr. Soto's conduct amounted to no more than a time-barred misdemeanor. The prosecutor admitted he was not aware of any crime that Mr. Soto could be charged with, other than a misdemeanor.

Nevertheless, the prosecutor informed the court that in an "abundance of caution" he had advised Mr. Soto it would be in his best interest to have counsel with him on Monday when he testified "because if he did, if there [were] questions asked of him where he could incriminate himself, he does have a right to have counsel present." The prosecutor assured the court he did not indicate to Mr. Soto in any fashion that "he could be prosecuted for his testimony if he can't."

Defense counsel objected that the "practical effect" of the prosecutor's warning was to potentially manipulate or tamper with the witness by placing him in fear of prosecution. The court observed: "I should not have taken you at your word yesterday, Mr. [Prosecutor], when you said there might be a Fifth Amendment issue. . . . There's not much we can do at this point. I just hope that Mr. Soto has not been in any way discouraged from providing testimony. . . because that would be an obstruction."

The next day, defense counsel represented to the court that Mr. Soto had appeared with counsel and intended to invoke his Fifth Amendment privilege. The prosecutor stated he had done some research and now believed Mr. Soto could be charged with implied malice murder on the theory that "he was aware of the dangers associated with driving while on a cell phone and that he knew that this could kill somebody," citing *People v. Moore* (2010) 187 Cal.App.4th 937. The prosecutor had done no investigation, had not spoken with Mr. Soto, and had not followed up on a subpoena for Mr. Soto's phone records issued by the prosecutor who handled the preliminary hearing. Nevertheless, he had told Mr. Soto "he could be a defense witness and he may be asked some questions that would incriminate himself and, therefore, he has the right to an attorney." He had advised his office of what he had done, and his supervisor told him they would look into Mr. Soto's potential liability at a later time.

The court expressed skepticism at the prosecution's malice analysis.

The court asked the prosecutor if he would petition the court for immunity so that Mr. Soto could testify for the defense, in the interest of seeking the truth. The prosecutor said he was not prepared to do that, and maintained he did not "see how this evidence hurts the defense. If Mr. Soto does not testify on the record, we have Mr. Williams, who is a very credible witness, who I'm arguing was a credible witness, said he saw Mr. Soto on his phone prior to the collision. That supports their theory."

Outside the presence of the jury, as anticipated, Mr. Soto appeared with counsel and invoked his Fifth Amendment privilege to all questions concerning January 29, 2012. Defense counsel complained that "whether it was by design, inadvertence, neglect, whatever it was, the District Attorney's new position may have worked unavailability of a witness. And I don't know what the remedy is . . . ." The prosecutor took issue with defense counsel's characterization of his office's practice of not interviewing witnesses before trial as unfair and inappropriate.

The court ruled the prosecutor had identified a theory of liability on Mr. Soto's part for murder or some type of manslaughter and whether or not it was likely that the district attorney would actually prosecute him was not germane to the inquiry as to whether Mr. Soto had a basis to assert the privilege. Accordingly, Mr. Soto was unavailable, and the prosecutor could, but was not required to, grant immunity to help the defense, "regardless of whether it's determining additional facts or not." The court ruled it could only impose judicial immunity if there is a clear record and clear indication of exculpatory evidence, "[a]nd we don't have that on this record."

Defendant's Right to Compulsory Process Was Not Violated by the Prosecutor's Advice that Mr. Soto Seek Counsel Prior to Testifying Because of Possible Self-Incrimination.

Defendant's first claim of error is that the prosecutor threatened Mr. Soto and intimidated him into not testifying, in violation of her constitutional rights. A criminal defendant has a state and federal constitutional right to compulsory process to secure the testimony of defense witnesses. (U.S. Const., 6th Amend., Cal. Const., art. 1, § 15.) That right is violated when the prosecution intimidates defense witnesses into refusing to testify.

"In order to establish a violation of his constitutional compulsory-process right, a defendant must demonstrate misconduct. To do so, he is not required to show that the governmental agent involved acted in bad faith or with improper motives. [Citations.] Rather, he need show only that the agent engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify . . . .' [Citations.] [¶] To establish a violation, the defendant must also demonstrate interference, i.e., a causal link between the misconduct and his inability to present witnesses on his own behalf. To do so, he is not required to prove that the conduct under challenge was the 'direct or exclusive' cause. [Citations.] Rather, he need only show that the conduct was a

substantial cause. [Citations.] The misconduct in question may be deemed a substantial cause when, for example, it carries significant coercive force [citations] and is soon followed by the witness's refusal to testify [citation]. [¶] Finally, the defendant must also demonstrate 'materiality.' To carry his burden under federal law, 'he must at least make some plausible showing of how [the] testimony [of the witness] would have been both material and favorable to his defense.' [Citation.] Under California law he must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable. [Citations]." (*In re Martin* (1987) 44 Cal.3d 1, 31–32 (*Martin*); accord, *People v. Jacinto* (2010) 49 Cal.4th 263, 269–270 (*Jacinto*).)

Defendant's claim is not well taken for several reasons. First, the record does not demonstrate the prosecutor engaged in misconduct, i.e., acted in a manner " ' "entirely unnecessary to the proper performance of [his] duties." ' " (*Jacinto*, *supra*, 49 Cal. 4th at p. 270.) We note the court told the prosecutor no fewer than three times he could advise the witness to bring counsel. The prosecutor said he advised Mr. Soto it would be in his best interest to have counsel with him on Monday when he testified "because if he did, if there [were] questions asked of him where he could incriminate himself, he does have a right to have counsel present." The prosecutor assured the court he did not indicate to Mr. Soto in any fashion that "he could be prosecuted for his testimony if he can't." The prosecutor only did what the court suggested he could do.

Merely advising of possible incrimination is not the same as threatening to prosecute the witness if he testified for the defense, as the prosecutor did to the witness Riley in *Martin, supra*, 44 Cal.3d at pages 36 and 37. The trial court here made an implied finding that informing the witness of the possibility of incrimination and his right to counsel was a correct thing to do and the DA abided by the court's instruction.

Second, assuming the prosecutor's advice concerning getting counsel was enough to cause Mr. Soto to refuse to testify (as opposed to his own counsel's advice), the record

does not show the testimony defendant was unable to present was favorable or material to his defense. (*Martin, supra*, 44 Cal.3d at p. 35; *Jacinto, supra*, 49 Cal.4th at p. 345.) The fact he denied using a cell phone to the police (although he admitted speeding) suggests he may well have denied using the cell phone at trial.

We also observe that, under the concurrent cause doctrine, defendant's conduct was a substantial factor here, regardless of any behavior attributable to Mr. Soto. " 'A defendant may be criminally liable for a result directly caused by [her] act even if there is another contributing cause.' " (*People v. Cervantes* (2001) 26 Cal.4th 860, 871 (*Cervantes*).) It is not disputed defendant's car hit Mr. Andrade's SUV, causing it to overturn and block traffic lanes on the freeway. It is also not challenged Mr. Soto's car hit the overturned SUV and Mr. Andrade, killing him. The trial court also instructed the jury pursuant to CALCRIM No. 590 (causation) and the jury's obligation to only focus on defendant in assessing criminal responsibility, refraining from considering culpability of other individuals. [1]

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[1] We note the trial court instructed the jury pursuant to CALCRIM No. 590: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death."

The jury was also instructed, pursuant to CALCRIM No. 373: "[T]he evidence shows that another person may have been involved in the commission of the crimes charged against defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged."

The Trial Court Was Not Required to Grant Mr. Soto Immunity from Prosecution to Testify for the Defense Under Current California Law.

Next, defendant contends the trial court's failure to grant Mr. Soto immunity to testify was error. We disagree. First, defendant did not ask the court to grant Mr. Soto immunity. The court raised the issue with the prosecutor on its own. Then, defendant failed to object when the court concluded it did not have the authority to grant immunity to Mr. Soto under the facts presented. Defense counsel did not make an offer of proof about what Mr. Soto would say if he testified. The issue is waived. (*People v. Cudjo* (1993) 6 Cal.4th 585, 619 (*Cudjo*); *People v. Lucas* (1995) 12 Cal.4th 415, 460 (*Lucas*); *People v. Williams* (2008) 43 Cal.4th 584, 622 (*Williams*).)

Furthermore, no California case has ever held trial courts have a due process duty to immunize defense witnesses to compel testimony. The power to immunize a witness is exclusively that of the prosecution, "and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant." (*Williams, supra,* 43 Cal.4th at p. 622.) Courts have no inherent authority to do this. The lone case recognizing inherent judicial authority to grant immunity is *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964 (*Smith*). The Third Circuit, sitting en banc, unanimously overruled *Smith* in *United States v. Quinn* (3d Cir. 2013) 728 F.3d 243.)

Even prior to *Smith*'s demise, our Supreme Court had consistently "characterized as 'doubtful' the 'proposition that the trial court has inherent authority to grant immunity." (*People v. Stewart* (2004) 33 Cal.4th 425, 468; *Williams, supra*, 43 Cal.4th at p. 622; *Lucas, supra,* 12 Cal.4th at p. 460; *People v. Hunter* (1989) 49 Cal.3d 957, 974; *Cudjo, supra,* 6 Cal.4th at p. 619.) Particularly since *Smith*'s demise, we are not in a position to upset at least four Supreme Court decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In any event, even if we were to ignore the waiver problem and existing precedent, we agree with the trial court the record assembled below does not meet *Smith*'s "stringent requirements." (*Stewart,* at p. 468.) The record

before us on this appeal provides no basis for determining that Mr. Soto's testimony was either clearly exculpatory or essential to an effective defense. (*Cudjo, supra,* at p. 620.) No error appears.

The Trial Court Did Not Err by Allowing Mr. Soto to Assert His Fifth Amendment Privilege.

Defendant argues the court should not have permitted Mr. Soto to assert his privilege against self-incrimination "because he was not reasonably subject to any 'real risk' of incrimination if he testified." We disagree.

"To invoke the privilege, a witness need not be guilty of any offense; rather, the privilege is properly invoked whenever the witness's answers 'would furnish a link in the chain of evidence needed to prosecute' the witness for a criminal offense. [Citations.] To satisfy this standard, 'it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' [Citation.] Consistent with these principles, our Evidence Code provides that when a witness grounds a refusal to testify on the privilege against self-incrimination, a trial court may compel the witness to answer only if it 'clearly appears to the court' that the proposed testimony 'cannot possibly have a tendency to incriminate the person claiming the privilege.' (Evid. Code, § 404.)" (*Cudjo, supra,* 6 Cal. 4th at p. 617.)

Applying this standard, we conclude the trial court acted correctly in permitting Mr. Soto to assert the privilege and refuse to answer any questions about the accident. Defendant concedes Mr. Soto could have been prosecuted for a felony violation of Penal Code section 192, subdivision (c)(1), vehicular manslaughter with gross negligence, even though "[u]sing a cell phone while driving constitutes mere negligence and not gross negligence." As the trial court accurately perceived, the issue before it was not whether Mr. Soto could be *convicted* of felony vehicular manslaughter (*People v. Seijas* (2005) 36 Cal.4th 291, 306) or whether the district attorney's office would *actually prosecute*

him for felony manslaughter, but whether Mr. Soto "reasonably apprehend[ed] danger at trial." (*Id*. at p. 307.) Because Mr. Soto admitted speeding and Mr. Williams testified Mr. Soto was looking at his cell phone immediately before striking Mr. Andrade with his car, anything Mr. Soto said about his actions prior to impact might result in an injurious disclosure. In any event, if Mr. Soto's cell phone usage while driving could only constitute mere negligence, as defendant argues here, his testimony could not have aided the defense. No reasonable jury could have found merely negligent driving so unforeseeable and unusual as to be a superseding cause of Andrade's death that relieved defendant of all criminal liability for causing the accident that stranded Mr. Andrade in the middle of a freeway in the first place. (*Cervantes*, *supra*, (2001) 26 Cal.4th at p. 871.)

The Trial Court Did Not Err in Denying the Motion for a New Trial Based on a Discovery Violation.

Defendant contends the trial court should have granted her motion for a new trial. She argues the prosecutor's failure to disclose his expert's opinion that defendant's driving was impaired by drug intoxication prejudiced her by causing her to forgo obtaining her medical records from Kaiser. At best, these records suggested she may have suffered a concussion in the accident, which could have explained the symptoms she exhibited at the hospital.[2] Defendant specifically disclaims any argument that her motion for a new trial should have been granted on the ground her medical records constituted new evidence.

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[2] Defendant visited Kaiser Permanente the day after the accident complaining of "head, neck and ankle pain." The proffered Kaiser records indicated in generic language that it was likely defendant had "concussion syndrome" and advised her "[f]or a few weeks, you may have low energy, dizziness, trouble sleeping, a headache, ringing in your ears, or nausea. [¶] You may also feel anxious, irritable, or depressed. You may have problems with memory and concentration. These symptoms are common after a concussion . . . ." Defendant's medical records from the night of the accident were not offered by the defense at the new trial motion.

Background

At the preliminary hearing, Denise Lyons, the prosecution's expert criminalist, testified the drug compounds found in defendant's blood can affect the ability to drive but, based on the information she was given, she could not say whether or not defendant's driving was impaired. During the prosecutor's opening argument, it became clear Ms. Lyons was prepared to testify at trial that defendant was impaired when the accident occurred.

The prosecutor never disclosed this opinion to the defense prior to trial. The prosecutor adopted the position that his only discovery obligation was to disclose statements from his experts. Since it was not his practice to interview his witnesses before trial, Ms. Lyons had not yet told him what she was going to say and he had nothing to disclose. He and Ms. Lyons worked together on many driving under the influence cases, and he had an understanding with her that "if she cannot render an opinion that the person is impaired, she will affirmatively call or e-mail me and let me know, hey, she can't make the opinion." Since in this case, she had not contacted him, he believed Ms. Lyons was prepared to testify defendant was impaired. This "understanding" was not disclosed to the defense, and Ms. Lyons subsequently disavowed its existence.

The trial court found a discovery violation. Following an Evidence Code section 402 hearing at which Ms. Lyons testified about the bases for her new opinion that defendant's driving was impaired, the court granted defense counsel a continuance as a remedy for the discovery violation. The court invited defense counsel to notify it if he needed more time to prepare. Defense counsel did not request more time.

In his declaration in support of the new trial motion, defense counsel averred: "I did not and indeed was not able to subpoena evidence regarding my client's diagnosis and medical records documenting a concussion. (Ex. B) The alternative scenario for my client's DRE findings was important only if the expert for the prosecution opined

differently than [she] did at the preliminary hearing. [¶] The revelations during opening statement on impairment and the subsequent testimony from the expert from the crime lab placed the defense in an untenable position. There was no way to timely call medical witnesses on Ms. Henry's behalf."

At the hearing on the new trial motion, trial counsel argued the prosecution's expert may have rendered a different opinion if she had known about the concussion, because his expert "who looked at this said we need to look at the medical records and other dynamics to determine truly how valid the HGN or the gaze nystagmus facts are." He also argued he would have brought in the Kaiser records had there been notice, "and that does rise to egregious conduct and does show prejudice because I was unable to call witnesses." The trial court denied the motion on this ground, citing its grant of a continuance, trial counsel's preparation, competence, and thoroughness, and its belief defendant's rights were not violated.

Analysis

We review the trial court's denial of a motion for a new trial for abuse of discretion. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252.) In considering a claim that the defendant's inability to present evidence prejudiced the outcome of the trial, "we justifiably accord considerable deference to the trial judge 'because of "his observation of the witnesses, [and] his superior opportunity to get 'the feel of the case.' " [Citation.]' " (*People v. Hayes* (1985) 172 Cal.App.3d 517, 524–525.) Here, when the trial court determined a discovery violation had placed the defense at a significant disadvantage, it conducted a hearing at which the expert testified and defense counsel was given the opportunity to cross-examine her about her changed opinion. The court then granted the defense a continuance to prepare to meet the new evidence, inviting defense counsel to ask for more time to prepare if he needed it. Defense counsel never indicated he needed more time to subpoena the medical records or medical personnel. Under these circumstances, we cannot second guess the trial court's determination the

defense had sufficient time to prepare for trial, or that the medical evidence would not have changed the outcome of the trial. No abuse of discretion appears.

The Trial Court's Choice of Discovery Sanction Was Not an Abuse of Discretion.

Defendant argues the trial court's decision to remedy the prosecutor's discovery violation by granting the defense a continuance, instead of excluding Ms. Lyons's opinion that defendant was impaired at the time of the accident, was error. We disagree.

We review a trial court's ruling on discovery matters for an abuse of discretion. "In particular, 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Defendant argues it was an abuse of discretion not to impose the more severe sanction because (1) the prosecutor's conduct was sneaky and unethical; (2) as a practical matter, in the middle of trial there was no way for defense counsel to acquire the necessary medical records and experts to rebut Lyon's opinion that defendant was under the influence of drugs while driving; and (3) the remedy of a continuance "essentially let the prosecutor go unpunished for his unethical discovery violation."

"Preclusion sanctions are drastic and must be used sparingly." (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1261.) Furthermore, under California's discovery scheme, preclusion is permissible only if all other sanctions have been exhausted. (Pen. Code, § 1054.5, subd. (c).) Here, the record demonstrates the court gave serious consideration to the matter. First, it conducted a hearing to "explore whether there is a discovery violation. It appears at the outset, there is. And if there is indeed a discovery violation, the next issue is going to be what additional information there is, if any; whether the defense can be prepared; what remedies, if any, are appropriate."

Ms. Lyons testified at the hearing about her opinion, and defense counsel was given an opportunity to cross-examine her. Defense counsel did not specifically request a preclusion sanction as a remedy for the discovery violation, or object to the continuance

as an inadequate remedy, either before the hearing, when the court indicated it was considering all options, including a jury instruction or mistrial; or afterwards, when the court said it would grant a continuance as a remedy. The prosecutor explained why he did not think he had broken any rules, but promptly complied with the court's directives to make amends. Under these circumstances, the court's failure to impose the drastic sanction of preclusion was no abuse of discretion.

Finally, we are not persuaded the prosecutor's discovery violation "placed defense counsel into the untenable position of having to make an *uninformed* tactical decision." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960.) Defendant was charged with gross vehicular manslaughter *while intoxicated* in June 2012. Trial counsel appeared with defendant at arraignment on the complaint a few days later. Trial commenced 14 months later, on August 21, 2013. It was incumbent on defense counsel to investigate the facts and the law integral to the elements of *that* charge. In our view, this included anticipating the prosecution would attempt to connect the dots between the toxicology report and defendant's driving, and preparing to rebut the connection if possible. The trial court invited defense counsel to ask for more time if he needed it. He did not ask for more time to obtain medical records or subpoena witnesses. On this record, we can only assume he made an informed tactical decision not to ask for more time.

The Prosecutor Did Not Commit Pervasive Prejudicial Misconduct.

Defendant argues the prosecutor "engaged in a pattern of deceitful and reprehensible misconduct which deprived [her] of a fair trial." " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt

to persuade either the court or the jury." ' " ' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Defendant claims the prosecutor intimidated Mr. Soto into asserting his privilege against self-incrimination, and that "Soto's testimony would have been convincing evidence that Andrade died because of [Soto's] negligence rather than [her] negligence." We have already discussed and rejected this contention.

Defendant also claims the prosecutor's discovery violation was egregious misconduct and, "[h]ad the prosecutor provided timely discovery, the jury would have learned that [she] had sustained a concussion." We agree with the trial court the prosecutor committed a discovery violation. However, as we have already discussed, the discovery violation was not so egregious as to call for the drastic remedy of preclusion, nor was it the but-for cause of defense counsel's failure to present defendant's medical records. And the discovery violation was cured by the remedial measures adopted by the court. Moreover, the discovery violation stemmed in large part from the prosecutor's practice of not interviewing his witnesses before trial, a practice which defendant does not contend, and we do not find, constitutes misconduct per se.

Inasmuch as we do not find a pattern of misconduct, we find defendant's claim of cumulative prejudice from prosecutorial misconduct without merit. (*People v. Hill* (1998) 17 Cal.4th 800, 844; *People v. Smithey* (1999) 20 Cal.4th 936, 1018.)

DISPOSITION

The judgment is affirmed.

_____
DONDERO, J.

We concur:

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HUMES, P.J.

_____
MARGULIES, J.